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No. 09-239

In The

Supreme Court of the United States

Josh A. Allen,

Petitioner,

v.

State of Montana,

Respondent.

On Petition For Writ of Certiorari
To The Montana State Supreme Court

# REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

In their opposition to the petition for writ of certiorari, Respondent attempts to "reframe the debate", by answering off point and out of context the issues that petitioner raises. This is further compounded by the fact that petitioner wasn't allowed to testify in his own defense. To begin with, the Petitioner would like to state that he doesn't agree with or concede to anything in the Respondent's brief of opposition unless expressly stated here or in petitioner's request for a Writ of Certiorari. Petitioner expressly disagrees with the Respondent's restating the issues on page (i) of his Brief in opposition. Petitioner disagrees that Respondent's STATEMENT OF THE CASE is factually correct, and maintains that his STATEMENT OF THE CASE is the true and accurate one. Petitioner, not being allowed to testify, couldn't make the record to explain how Deputy Matkin's testimony changed from the Justice Court to the District Court, in order to comport his actions and testimony to existing case law and legal definitions, all at the coaching of the local prosecuting attorney. Respondent makes unsubstantiated suppositions about Petitioner's behavior and legal arguments, while making light of the fact that Petitioner wasn't allowed to testify.

Petitioner would suggest that the State of Montana, via its prosecuting attorneys and Courts, has gone to such lengths to avoid admitting that they falsely arrested and imprisoned Petitioner.

## I. DISAGREEMENT(S) WITH RESPONDENT'S STATEMENT OF THE CASE

On page 1 of Respondents Brief (RB) Deputy Matkin claims Petitioner ducked behind a hedge, and began to run around the building. Petitioner did not duck behind any hedge row. Petitioner did not run as hard as he could. On (p4 RB) Matkin claims Petitioner attempted to "hook" his legs. This is a flat out lie; Petitioner moved his foot about two inches in order to move his right hip in anticipation of Matkin removing his wallet from his pocket. When he did this, officer Mike Labaty grabbed a big handful of petitioners hair, rudely yanked his head back, and yelled in his ear, "that's a felony boy assaulting an officer, now you're going to Deerlodge" (Montana State prison location). Fearing further assault upon him, petitioner quickly explained that he didn't want the contents of his wallet spilled. As Petitioner sat in the holding cell at the Detention center, he listened to Matkin tell the booking officer how he would "like to charge him with felony assault, but didn't think he could make it stick". Petitioner has stated this in his pleadings to the lower courts already.

When petitioner stated that there where no "factual issues to be decided at trial" and only legal issues, he meant insofar as the issue of whether he did or did not give his name. On (p7 RB) respondent raises petitioner's reliance on previous Supreme Court cases and his recent awareness of *Hiibel*. Petitioner mentioned this in his earlier defenses as Montana law states that relying on U.S. Supreme Court cases is a defense. Here respondent is insinuating that Petitioner is raising his fear of an

arrest warrant after reading *Hiibel*, in order to create another defense based on *Hiibel*, this is unsubstantiated and simply not true. Petitioner, being a mere pro se litigant did not realize that his fear was a valid defense. The Petitioner's statement about reading *Hiibel* after reading Brown v. Texas, Terry v. Ohio, and Miranda was made in the context of Relying on these cases as a defense to negate the "knowingly portion of Mont code 45-7-302 (Appellate Br. Montana Supreme Court page 29).

## II. REASONS THE PETITION SHOULD BE GRANTED

### 1. PETITIONER WAS DENIED EQUAL PROTECTION AND DUE PROCESS WHEN HE WASN'T ALLOWED TO TESTIFY IN HIS OWN DEFENSE.

Respondent essentially claims that *Gordon v. Idaho*, 778 F.2d 1397 (1985) is off point and out of context. The Montana Court's treatment of the issue, contrary to Respondent's claim, heavily conflicts with *Gordon*. *Gordon* is directly on point in this case. Respondent claims that Gordon did not seek to avoid any sort of affirmation requirement because "he represented he would affirm in the following manner","I understand that I must tell the truth, I agree to testify under penalty of perjury." (p24RB). Since when does a prosecuting attorney have the authority to determine what "representing to affirm" means? If you read *Gordon*, you will see that he expressly refused to swear an oath or affirm in any way because the two terms are synonymous, and the cited biblical verses prohibit anything more

than a yes or no answer. Petitioner's Writ App. 24-25. To decide that the Montana or Federal rules of evidence requirements can override a Citizen's religious beliefs is both an infringement on religious free exercise and equal protection and due process. Respondent's claim that the issue was not raised until trial is patently false, as mentioned in Petitioner's Writ (App. 24-25), the "Notice of Refusal to Swear or Affirm to Take an Oath" was filed almost one full month ahead of trial, the District Judge had a duty to at least read it, and then determine a way for Petitioner to testify. Even being filed on the "eve" of the preliminary hearing the judge could have read a simple two page notice. Respondent claims that "even at this late stage, Allen fails to apprise this court how Allen's conscience could have been awakened and his mind impressed with the duty to testify truthfully without violating is alleged religious beliefs" (p25 RB). Petitioner plainly agreed to tell the truth in his notice. What more could someone do who believes anything more than a yes or no answer is prohibited by the bible? In this case, just like *Gordon*, the Judge had a duty to investigate and probe for a way for Petitioner to testify. Contrary to what Respondent would claim, this argument was raised the moment *Gordon v. Idaho* was raised. Even if *Gordon* was never raised, Petitioner still had the Constitutional right to testify in accordance with his religious beliefs. Petitioner would have testified, but the judge would not let him. Being allowed to testify could have easily shifted the combination of legal issues and contested issues of fact in the Petitioner's favor. Petitioner could have testified, amongst other things, to his fear of having an outstanding speeding ticket, and the fact that he

did not know whether or not he had any warrants out for his arrest. Petitioner prays this Court will give him relief from the lower courts running roughshod over his rights, and in the process set precedent to protect others from the same treatment.

## 2. THIS CASE IS DIFFERENT FROM HIIBEL.

The Respondent's brief, though carefully crafted is full of subtle contradictions and unsubstantiated claims. In some places, Respondent claims that Petitioner was trying to "evade" police, while elsewhere he claims that Petitioner "knowingly provoked" law enforcement. Does it make credible sense that if Petitioner is trying to avoid a confrontation with police, that he is also trying to "bait" them? Does it make sense that Petitioner was looking forward to a four day stay in jail, and all of this expense and effort to defend himself? Had Petitioner been allowed to testify, he could have explained that he was trying to avoid a late night confrontation, because of bad past experience. Respondent's claim that Petitioner knowingly provoked this is unsubstantiated.

The material circumstances that initiated this case are what begin to set it apart from *Hiibel v. Nevada* 542 U.S. (2004). In *Brown v. Texas, Terry v. Ohio, Kolender v. Lawson*, and Petitioner's case the policeman just "happened upon" the suspect and acted in his own unfettered discretion. In *Hiibel* the police were called out to the scene to investigate. Nor did *Hiibel* involve the tense circumstances of the suspect being ordered to the ground and put in handcuffs, and then placed under questioning.

Next, despite what Respondent would like this Court to believe, Montana law is different than

Nevada law, (Petitioners Writ p4-10). The language of Mont. Code Ann 46-5-401 uses two different words, request and demand, which are not synonymous. Montana law mentions the suspect's actions, address, and name under the word request. *Hiibel* mentions demand of a name and nothing else. Respondent claims the "language differences are inconsequential because the request for identification is clearly a lawful request", (p28 RB). A policeman can lawfully request that a murder suspect confess, however even if that suspect is guilty it is not a crime for the suspect not to confess. Under Respondents line of reasoning it would be a crime for the suspect to not confess, because apparently Respondent believes request and demand are legally synonymous. The simple fact of the matter is Montana law doesn't require a Citizen to identify themselves to a policeman.

Next, *Hiibel* never made the claim that he was concerned that his name could be the beginning link in a chain of evidence. Respondent insinuates that Petitioner read *Hiibel*, and then came up with this defense. This is not true, had Petitioner been allowed to testify, he could have substantiated this. Even without this claim, Petitioner would like to know how he could have known, at the scene that he did not have any warrants out for his arrest, or that there was no possible way for his name to be used against him. Respondent claims (p23 RB) that the police officers are "often forced to make split-second judgements – in circumstances that are tense, uncertain, and rapidly evolving" (In regards to placing Petitioner in handcuffs for officer safety). If a policeman can make split-second decisions to protect himself, then under equal protection and due

process shouldn't a Citizen be able to make similar decisions to protect his rights? If the answer is no, then how is the average man on the street who faces a similar situation able to protect his rights? While he is under pressure, being questioned at the scene by a policeman, is he to think to himself, gee does this situation fall under Terry, Brown, Kolender, or Hiibel, what are my Miranda rights here? To put such a burden on the average citizen is to defeat the simple intent of the Fifth Amendment. At the scene, Petitioner was under this same duress and not knowing for sure that his name could not be used against him he chose to shut up.

> "The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and farsighted." *Marchetti v. U.S.* 390 U.S. 39 (1967)
>
> "You can and must keep your mouth shut for protection under the 5th amendment." *Belnap v. U.S.* et al, Dist Court (Utah), No C. 149-71.
>
> "There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves" *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

Respondent cleverly fails to emphasize the admission by deputy Matkin (p2, p15 RB) that one of the purposes of wanting Petitioner's name was to search for warrants. The hypocrisy of the

Respondent's argument is that it is ok for the policeman to demand a suspect's name for the purposes of looking for warrants, thus admitting the value of the name for investigatory purposes, but it is not ok for the suspect to withhold his name to protect himself from the same investigation. The respondent thus concedes that petitioner's name could be the beginning link in a chain of evidence to be used against him. The respondent then claims that since no warrants were found that there was no reasonable possibility that the petitioner's name could be used against him. This implies that the petitioner had to prove ahead of time that he needed the Fifth Amendment, obviously contravening its intended purpose. The Supreme Court declared that:

> "The privilege afforded not only extends to answers that would in themselves support conviction under a federal criminal statute but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal crime.....*The claimant is not required to prove the precise danger since by so doing he would be forced to disclose those very facts from which the privilege protects. Hoffman v U.S. (CF 341 U.S. 479,486,71 CT. 814,818,95 L Ed 1118.*
>
> "The (5th amendment privilege is not limited to testimony, as ordinarily understood, but extends to every means by which one may be compelled to produce information which may incriminate." Boyd vs. U.S. Supra; Brown vs Walker, 161, U.S. 591.

According to the logic put forth by the respondent, and lower courts, one only has Fifth Amendment protection if there is absolute proof beyond a shadow of a doubt, that there is something incriminating with which to need its protection. Which in turn would imply that the person bring forth the incriminating evidence to gain the protection of the Fifth Amendment. If this is the case then an obstruction statue can be used to prosecute a murder suspect for not confessing, and the original intent of the Fifth Amendment is null and void.

## 3. THIS CASE PRESENTS AN OPPORTUNITY TO BETTER UNDERSTAND MIRANDA RIGHTS

Respondent also claims that Petitioner complicated the stop and turned it into an eventual arrest by refusing to give his name, knowing that his identity would be ascertained during the booking process (p22 RB). Here again Respondent is assuming facts not in evidence, assuming that Petitioner knew he would be arrested. Petitioner assumed his refusal to give his name was legal under his Miranda right to remain silent. Respondent also states over and over that this was a lawful request, and that the refusal to answer is an obstruction. Petitioner has agreed over and over that the policeman can ask him questions, however Petitioner has always maintained he has no corresponding duty to answer them, just as someone guilty of a crime has no duty to confess, even though this obstructs the police that are investigating that person.

> "The Officer may ask the terry detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond" *Berkemer v. McCarty,* 468 U.S. 420, 439 (1984).
>
> "Of course, the person stopped is not obliged to answer, answers may not be compelled and refusal furnishes no basis for arrest, although it may alert the officer to the need for continued observation." *Terry v. Ohio,* 394 U.S. at 34

Petitioner does not concede that this was just a Terry Stop, as being placed facedown in the dirt, handcuffed, and not being free to leave easily meets the definition of an arrest. Petitioner, though not interrogated in an interrogation cell was still asked questions for the purpose of gaining information to be used against him. This court left the issues in this case unanswered in *Hiibel*, this case presents an opportunity to answer them.

## CONCLUSION

This petition presents an opportunity in which to better understand Miranda rights, Terry stops and further define the First Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. This case is not *sui generis* as Respondent claims, as similar situations occur everyday around this nation. The opinion below is clearly erroneous as a matter of law, fails to comport with reason, logic and common sense, conflicts with the 9th Federal Circuit, intent of

Montana lawmakers, and most importantly previous case law of this Court. So as to protect the Constitution and laws of the United States, and prevent a slide down the slippery slope to a police state, Petitioner prays that this Court issue a writ of certiorari and vacate the judgment of the Montana State Supreme Court.

Respectfully submitted,

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